BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH K. SUBLETT	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 186,917 & 219,875
INTRACORP	)	
Respondent	)	
AND	)	
	)	
CIGNA WORKERS COMPENSATION	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appealed the Award dated October 8, 1998, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on March 12, 1999.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for the respondent and its insurance carrier. E. Lee Kinch of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant injured her left ankle on August 23, 1993. The compensability of that accident is not disputed. Claimant injured her right ankle on October 27, 1993. Respondent denies that accidental injury arose out of and in the course of her employment. The nature and extent of claimant's disability is an issue in both docketed claims. The claims for these two accidents are combined under Docket No. 186,917. The administrative file reflects that Docket No. 219,875 was created in error.

Citing Pinkston,[1] the Administrative Law Judge found claimant's right ankle injury arose out of and in the course of her employment with the respondent. The ALJ then found that the right ankle injury was a direct and natural consequence of the left ankle injury. The ALJ combined the two injuries and entered a single award based upon a 6 percent impairment of function to the body as a whole for both accidental injuries.

The ALJ denied claimant a work disability because she was eventually able to earn wages equal to 90 percent or more of the average gross weekly wage that she was earning at the time of her first injury.[2] Claimant appeals that finding arguing she is entitled to a work disability for the period of time beginning with her release to return to work until the date she began earning 90 percent or more of her preinjury average weekly wage. Respondent contends, as stated previously, that the October 27, 1993 accident should not be treated as having arisen out of and in the course of claimant's employment. But if it is, then the two accidental injuries are separate and distinct and benefits should be awarded as two separate scheduled injuries instead of combining the two and entering a single body as a whole award. Finally, respondent argues that if the injuries are to the body as a whole, claimant is not entitled to a work disability because her post-injury earnings were only below 90 percent of her average weekly wage because claimant voluntarily worked less than 40 hours per week. Accordingly, the issues for Appeals Board review are:

> For the August 23, 1993 left ankle injury, what is the nature and extent of claimant's disability?
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> For the October 27, 1993 right ankle injury, whether claimant's accidental injury arose out of and in the course of her employment with respondent; and, if so, what is the nature and extent of her injury and disability.

FINDINGS OF FACT

1. Claimant is a registered nurse. In 1988 she began working for respondent as a medical case manager. Her responsibilities included coordinating the medical care of patients with work related injuries.

2. On August 23, 1993, claimant was exiting her vehicle at the parking lot for the Kansas Orthopedic Center. She was there to visit a client in connection with her job duties for respondent. When she turned to get her purse and files out of the car, her left ankle twisted and she came down off her shoe.

3. Claimant reported this injury and received authorized medical treatment. She eventually came under the care of orthopedic surgeon Jay Stanley Jones, M.D. He placed her left lower leg in a cast and instructed claimant to use crutches.

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[1] Pinkston v. Rice Motor Co., 180 Kan. 295, 303 P.2d 197(1956).

[2] K.S.A. 44-510e(a).

4. On October 27, 1993, claimant left her home on her way to an appointment with Dr. Jones. She stepped down from the sidewalk in front of her house to the gravel driveway at which time her right ankle went out from under her and she fell.

5. Claimant denied any subsequent injuries to either her left or right ankle, but admittedly had a history of prior injuries to both lower extremities. In approximately 1975 claimant broke her right foot across the top when she kicked at her two Doberman Pincher dogs which were fighting. Claimant also testified about injuries to her left ankle including an incident in 1989 when she turned her left ankle while carrying her daughter and stepping down onto a driveway. According to claimant, Dr. Jones assigned a 10 percent permanent impairment of function to her left lower extremity for that injury.[3] In 1992 claimant suffered a fracture of her left leg. But no permanent impairment was assigned for that injury and claimant returned to work without restrictions.

6. Claimant was examined for rating purposes by Lawrence R. Blaty, M.D., on February 19, 1997. He diagnosed left ankle avulsion and sprain, right ankle talofibular ligament sprain and secondary left knee strain. Using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, Dr. Blaty rated claimant as having a 10 percent permanent functional impairment to the left ankle and 6 percent to the right lower extremity for the right ankle injury which he combined as a 6 percent rating to the body as a whole. Dr. Blaty did not attempt to separate out the amount of any preexisting impairment claimant may have had. He said if Dr. Jones had assessed a 10 percent impairment to the left ankle in 1989, he would neither agree nor disagree with that.

7. Claimant was also examined by Naomi N. Shields, M.D. She diagnosed a chronic left lateral ligamentous ankle instability, multiple injuries to the left ankle with chronic history of Achille's tendinitis. She recommended rehabilitation of claimant's peroneal musculature, proprioception, use of a lace up ankle brace and appropriate supportive shoewear. In the opinion of Dr. Shields, surgical reconstruction of claimant's lateral ligaments was also a possibility combined with an ankle arthroscopy. Using the AMA Guides Fourth Edition, Dr. Shields assigned claimant a 4 percent whole person rating for moderate ankle instability, which represents a 10 percent impairment of the lower extremity and a 14 percent rating to the foot. She attributed the majority of claimant's left ankle instability to the August 23, 1993 injury. Dr. Shields did not give a rating for the right lower extremity.

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right

[3] Claimant initially testified that Dr. Jones rated the impairment for her prior left ankle injury at 13 percent, but upon questioning by respondent's counsel she agreed it was 10 percent.

depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[6]

In Helms,[7] the Kansas Court of Appeals held that injuries suffered in a car accident going to or coming from medical treatment for work related injuries are compensable. The Appeals Board finds that claimant's October 27, 1993 injury to her right ankle occurred while she was on her way to medical treatment for her work-related left ankle injury and is, therefore, compensable. In Helms, however, the Court of Appeals also found that the injuries suffered in the collision represented a new accident. Following the logic of the Helms and Taylor cases, the Appeals Board finds claimant's right and left ankle injuries should be treated as separate accidents. As such, claimant is entitled to compensation for each as a scheduled injury pursuant to K.S.A. 44-510d(21) and these accidents should not be combined into a general body disability.

The Appeals Board concurs with the ALJ's decision to adopt the opinions of Dr. Blaty and finds claimant has a 10 percent permanent partial impairment to the left ankle and a 6 percent impairment to the right ankle. The Appeals Board further agrees with the ALJ that the record does not establish the amount of functional impairment, if any, that preexisted these work-related injuries.[8] The 1975 injury to claimant's right foot was an avulsion of a small bone on the top of the foot. It was not to the ankle. The 1989 left ankle injury, however, was to the same area as the injury in Docket No. 186,917. According to claimant, Dr. Jones assigned a 10 percent permanent impairment of function rating as a result of that prior injury. Dr. Jones, however, did not testify and there is no evidence concerning how he arrived at his rating for the 1989 left ankle injury. Dr. Blaty used the AMA Guides Third Edition. There is no indication that the rating given by Dr. Jones was pursuant to the AMA Guides. Dr. Blaty did not give an opinion concerning the percentage of his rating that preexisted. Dr. Shields noted that some amount of left lateral ligamentous instability and left Achille's tendinitis predated claimant's work-related accident. But she neither ascribed a percentage to those preexisting conditions nor apportioned her ratings between the preexisting and the work-related injuries.

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[4] K.S.A. 44-501(a). See also, Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993); Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[5] K.S.A. 44-508(g). See also, *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 44-501(g).

[7] Helms v. Tollie Freightways, Inc., 20 Kan. App. 2d 548, 889 P.2d 1151 (1995); see also, Taylor v. Centex Construction Co., 191 Kan. 130, 379 P.2d 217 (1963).

[8] See Slack v. Thies Development Corp., 11 Kan. App. 2d 204, Syl. ¶ 3, 718 P. 2d 310 (1986).

The record does not apportion the weeks of temporary total disability compensation paid as between the left and the right ankle injuries. As claimant was still off work for the left ankle injury when she injured the right ankle, for purposes of the award calculations, the temporary total disability will be treated as all having been paid for the first accident to the left ankle.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark, dated October 8, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Deborah K. Sublett, and against the respondent, Intracorp, its insurance carrier, CIGNA Workers Compensation, and the Kansas Workers Compensation Fund for an accidental injury which occurred August 23, 1993. Claimant is entitled to 45.14 weeks of temporary total disability compensation at the rate of $313 per week or $14,128.82, followed by 14.49 weeks at the rate of $313 per week or $4,535.37, for a 10% scheduled injury to the left lower leg, making a total award of $18,664.19, which is ordered paid in one lump sum less any amounts previously paid.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Deborah K. Sublett, and against the respondent, Intracorp, its insurance carrier, CIGNA Workers Compensation, and the Kansas Workers Compensation Fund for an accidental injury which occurred October 27, 1993. Claimant is entitled to 11.40 weeks at the rate of $313 per week or $3,568.20, for a 6% scheduled injury to the right lower leg, and is ordered paid in one lump sum less any amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of September 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I disagree with the majority's award because it includes the amount of claimant's preexisting functional impairment. K.S.A. 44-501(c) provides, inter alia, that:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

The record shows that claimant suffered a similar injury to her left ankle in 1989, that she had chronic problems with the ankle before this work-related aggravation and that she received a permanent functional impairment rating for that prior injury. That the claimant had some preexisting functional impairment is clear. What is not clear is how much of claimant's current functional impairment is new, that is to say how much is a result of her August 23, 1993 accident, and how much preexisted. I agree with the majority that respondent has not proven a 10 percent preexisting impairment to the left ankle. But it is claimant's burden to prove all of the various conditions upon which her entitlement to compensation depends. This includes proving what the nature and extent of her disability is from the alleged work-related accident. Claimant bears the burden of proving how much of her present impairment is from the work-related accident. The majority shifts this burden to respondent by requiring respondent to prove the percentage of claimant's preexisting functional impairment.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Douglas C. Hobbs, Wichita, KS
E. Lee Kinch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director